should ascertain that he can understand, and be understood by the accused with sufficient ease to enable the proceedings to be properly conducted. The most convenient method is to allow him to talk for a few moments with the accused and to enquire whether they can so understand one another. When the Court is satisfied of this, it should be incorporated in the record before the evidence is recorded. There are, of course, cases when this would be quite unnecessary, for example, if both the accused and interpreter are Siamese and are speaking Siamese and the interpreter is fluent in English."

With respect I entirely agree with those remarks but I go further. In a large number of cases in the Magistrates' Courts in this country the accused speaks a language not understood by the Magistrate, so that what transpires between the accused and the interpreter is unknown to the Court. It is, therefore, the duty of the interpreter not only to make sure that he and the accused understand one another but it is also his duty to inform the Court, if there is any difference of language which might cause any difficulty. If the interpreter present cannot converse freely with the accused in the language of his choice the Court must be informed so that a suitable interpreter can be found, however inconvenient this may be to the Court, to the parties or to the witnesses.

Magistrates also have a duty in this matter. In the example given in the above quoted extract from the judgment in *Fong Hong Sium v. Public Prosecutor*[1] there would be no difficulty; but if in that example the word "Chinese" is substituted for the word "Siamese" the situation is entirely different. As is well known it is not enough that for a Chinese accused there should be a Chinese interpreter — there must be a Chinese interpreter who is competent to interpret in the accused's particular dialect. And just because the accused and the interpreter are both Chinese any difficulty which may arise will not be apparent to the Magistrate; which is what happened in the case now before me. Magistrates must, therefore, ensure as a matter of routine in their Courts, that interpreters ascertain the language or dialect of the accused in all cases and inform the Court of any difficulty there may be. One method of doing this (though I do not lay this down as the best or only method) is to make a practice of writing after the name of the accused in notebook his own dialect and the dialect which is being used. Thus in the present case the record might have read as follows :—

"Accused Huang Chin Shiu, Khengchew, speaking Hokkien . . . "

If this had been done the difference between the two dialects would have put the Magistrate on his guard.

I have already in a recent judgment drawn attention to the importance of an accused who pleads guilty receiving the same consideration before sentence as one who has claimed trial, and need not repeat my remarks here. Nor do I need to stress the importance of making sure that a plea of guilty is fully intended, because I am certain that Magistrates are fully alive to the importance of this. I cannot, however, overemphasise the great importance of making sure of always using an interpreter who is fluent in both the accused's own language and the language of the Court.

For the reasons given above I allowed the accused to withdraw his plea of guilty and remitted the case to the Magistrate for retrial.

Order accordingly.

GURCHURN SINGH v. THE CHARTERED BANK OF INDIA, AUSTRALIA & CHINA.

[Court of Appeal (Murray-Aynsley, C.J., Singapore, Abbott and Briggs, JJ.) November 18, 1951]

[J.B. — F.M. Civil Appeal No. 35 of 1951]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 4(2)(b) and (c) — Payment caused by duress or coercion — Burden of Proof.

In this case the respondents applied for the reinstatement of a charge and the revaluation of a payment made to the Japanese Custodian of Property. Before the occupation the respondents were the holders of a charge on land belonging to the appellant. During the occupation the amount owing was paid to the Japanese Custodian by the appellant. The appellant argued that the payment made by him was caused by duress and coercion. The learned trial Judge found that the payment was not caused by duress and coercion and the appellant appealed against this finding.

Held, (1) that the burden of proof in this case was on the appellant and he must produce evidence to bring himself within the exception set out in section 4(1)(b) of the Debtor and Creditor (Occupation Period) Ordinance 1948; (2) that on the facts it was clear that the appellant would not but for fear of the consequences have paid off the loan and therefore he had discharged the burden of proof on him, the appeal must be allowed.

Cases referred to :—

(1) *Bank of China v. Lam Tai Cheng & others* (1951) M.L.J. 152.

(2) *Abdul Hameed & Co. v. A. M. S. Nainam Sahib & Co.* (1951) M.L.J. 103; 2 M.L.R. 71.

(3) *A. L. S. Sadayappa Chettiar v. P. C. R. ML. Letchumanan Chettiar* (1951) M.L.J. 105.

COURT OF APPEAL.

C. S. Jayaswal for the appellant.

F. G. Vaux for the respondents.

The facts and arguments appear sufficiently from the judgments.

Cur. Adv. Vult.

Murray-Aynsley, C.J. : — These proceedings arose out of an application by the respondents for the reinstatement of a charge and the revaluation of a payment made to the Japanese Custodian.

Before the Occupation the respondents were the holders of charge on land belonging to the appellant. During the Occupation the amount owing was paid to the Japanese Custodian by the appellant.

By section 4(1)(b), the payment would fall to be revalued "except where payment was caused by duress or coercion".

At first instance the learned Judge found that the payment was not caused by duress or coercion.

The appellant appeals against that finding.

At the hearing it was agreed that the burden of proof of the existence of coercion lay on the appellant and the hearing was conducted on that basis. On the hearing of this appeal counsel directed the attention of the Court to the Singapore case of *Bank of China v. Lam Tai Cheng & Ors.*[1]. In that case the learned Judge on the strength of the Federation case of *Abdul Hameed & Co. v. A. M. S. Nainam Sahib & Co.*[2] considered that the burden of providing the absence of coercion lay on the person who sought revaluation. It should be noted that the Federation case fell under section 4(2)(b). The language used there is quite different from that in 4(2)(c). I think that the different language produces a different result under section 4(2)(c) and that as a matter of interpretation I consider that cases under (c) are not affected by the Federation case. On general principles I consider that the appellant must produce evidence to bring himself within the exception. The judgment cannot, therefore, be attacked on that ground.

Considering the merits of the appeal, certain considerations of a general character should be borne in mind. The Ordinance distinguishes between demands by the Japanese Custodian and demands by creditors or their agents. A mere demand by a Custodian is not enough to exclude revaluation as a matter of law. There must in addition be something to bring it within the definition in sub-section (5). On the other hand, it must be remembered that the Custodian was, equally with the 'kampetai', an organ of a power that was entirely divorced from any consideration of justice or legality and enforced its will with the utmost violence. Therefore, when once there is evidence of a demand it has to be considered whether the demand was one which a reasonable man could safely ignore.

At the hearing, parole evidence was given by the appellant and there was also an agreed bundle of correspondence. From the evidence of the appellant it appears that owing, no doubt, to views he had expressed previously, he from the outset attracted the attention of the Japanese and was interned when they landed in Penang, where he then was. It appears that he also got into trouble for not falling in with the wishes of the Indian Independence League. At the same time he was subjected to demands, from September 1942, for the repayment of the loan to the respondents. Ultimately he repaid the loan but, in order to do so, he had to realise another property at a time when no one would sell land if he could help. The appellant was clearly unwilling to do so and final settlement was only made in August 1944.

There was nothing to contradict the evidence of the appellant, but the learned Judge seems to have taken the line that it was possible to regard the relations between the appellant and the Custodian in complete isolation from his relations with the Japanese authorities otherwise. That seems to me to be a wrong way of looking at it in any case. In the present case it does not seem to be justified by the evidence. The appellant said (at p. 17 of the record):—

> "I was sent for by (the) Penang Custodian who informed me that the Liquidation Officer in Singapore had instructed him to pay this loan. I told him I was making efforts to sell. He made it plain to me that if I did not sell it would be taken as non-co-operation. If that had not been said I would not have sold one inch of land."

This is borne out by a letter of November 19, 1943. This letter, sent by the Liquidation Officer in Singapore, ends with the following passage:—

> "In connection with the liquidation of Enemy Banks, you are now requested to make every effort to settle your outstanding balance within this year, in co-operation with, and loyalty to, the Nippon Military Administration."

In view of that it seems to me impossible to regard the demands of the Custodian merely in the light of requests by a bank manager to pay off a loan. During the Japanese occupation "Non-co-operation" was as ominous a phrase as "collaboration" was in other places.

It is, I think, necessary in all cases of this kind, to consider what would be the effect of a demand on a person in the circumstances of the recipient; whether it was one which the recipient could ignore with impunity. In all the circumstances of the case, I consider that the only possible conclusion on the evidence was that the appellant would not but for fear of the consequences have paid off the loan.

In my opinion the appeal should be allowed.

Abbott, J. : —I agree with the Chief Justice.

Briggs, J. : —In 1939 the appellant charged certain lands in the Federation to the respondents. During the occupation the respondents were treated by the Japanese as an enemy corporation and the Japanese Custodian of Enemy Property collected their assets. In the course of doing so he demanded repayment of the monies due by the appellant. The appellant, though he never refused to pay, was obviously most reluctant to do so. He was pressed repeatedly and at last succeeded in selling certain other lands and in paying off the amounts due on the charges to the Custodian out of the proceeds of sale. The respondents sought in Muar Originating Summons No. 119 of 1950 an order that the payments made to the Custodian as aforesaid should be revalued under section 4(2)(c) of the Debtor and Creditor (Occupation Period) Ordinance, 1948, and asked for reinstatement of the security. The only issue in the case was whether the payment to the Custodian was caused by duress or coercion within the meaning of the exception to section 4(2)(c) of the Ordinance. The learned trial Judge had before him affidavits of an officer of the respondents and of the appellant himself. He also heard the oral evidence of the appellant, and he found that no duress or coercion sufficient to satisfy the section had been proved. He accordingly made an order in favour of the respondents.

The appellant based his appeal on several grounds and in particular raised, by leave, a further ground which did not appear in his original Memorandum. It was that in view of the decision in *Bank of China v. Lam Tai Cheng*[1], his Counsel had been wrong in accepting the onus of proving duress or coercion and that in law such onus properly lay on the applicant Bank. There is no doubt that the case cited is authority for that submission, but I am of opinion that in this respect the case was wrongly decided. The learned Judge based his decision on the decision of the Court of Appeal in *Abdul Hameed Mohamed Ibrahim & Co. v. A. M. S. Nainam Sabib & Co.*[2] He said,

> "Although the decision in that case proceeded upon a consideration of sub-section (2)(b) of section 4 of the Ordinance, in my opinion the principles there laid down must apply equally to sub-section (2)(c), which is the paragraph relevant to the facts of the case before me."

In this I think the learned Judge erred. It appears to me that the principles governing the question of onus in cases under section 4(2)(c)(ii) are different from those governing a case under section 4(2)(c) such as he was trying and such as this. In the former class of cases it is necessary in order to obtain revaluation to show :—

(1) That payment was made after 31st December 1943 in occupation currency;
(2) That it was in respect of a pre-occupation capital debt exceeding $250 in amount;
(3) That payment had not been demanded by the creditor or his agents;
(4) That the debt was not payable within the occupation period under a time essence contract.

In Abdul Hameed's case[2], as I understand it, the Court of Appeal held that the allegation of no demand under item (3) above was in substance part of a general affirmative allegation that a specific state of affairs existed which was such as to entitle the applicant to revaluation. In effect the fact to be proved is that payment was made on the initiative of the debtor rather than at the instance of the creditor or in accordance with an express provision. It was held accordingly that the general rule under which a plaintiff is not ordinarily required to prove a negative did apply. This seems to be entirely in accordance with section 101 of the Evidence Ordinance. Under section 4(2)(c) the matters to be proved are different. In order to entitle the applicant to revaluation it is necessary to show :—

(1) That payment was made in occcpation currency to a Custodian or Liquidation Officer; and
(2) That it was in respect of a pre-occupation capital debt exceeding $250 in amount.

The last words of the paragraph, "except where payment as aforesaid was caused by duress or coercion", are in my opinion, as Mr. Vaux for the respondents submitted, an exception on an exception. The general rule is that payment in occupation currency discharges a debt in full. It is for the applicant in cases of this kind to show that he is within the exception created by the first part of para (c), but it is not necessary for him to go further and allege or prove that he is not within the further exception on that exception. That is no part of the affirmative proposition which he must prove, and it appears to me that it falls within the normal rule that a party is not obliged to prove a negative. As a matter of construction, I think the two paragraphs are in different categories. There is, however, a further reason for holding that the onus of proof of duress or coercion must in any event be on the debtor in a case of this kind. It arises from section 106 of the Evidence Ordinance which reads :—

> "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Duress depends at least in part on the state of mind of the person in question, and that is a matter of which he has inevitably special individual knowledge. I think he is within the principle of illustration (a) to this

section. The section also, I think, applies or may apply in another way. In this case it was alleged that the threats which caused the duress were made by the Japanese Custodian, and/or his officer, at interviews at which only the appellant and they were present. Assuming the impossibility of producing either of the Japanese in question, it would clearly have been physically impossible for the respondents to prove precisely what transpired at these interviews. The appellant has special knowledge of that and it is for him to prove it. It has been held by the Court of Appeal in *A. L. S. Sadayappa Chettiar v. P. C. R. ML. Letchumanan Chettiar*[3], that in an application under section 4(2)(b) (ii) an affidavit made as of information and belief is insufficient, and that an application based only on such an affidavit would be subject to dismissal *in limine*. If that principle governs applications under section 4(2)(c), and I think it does, few could succeed if absence of duress had to be proved by the applicant. It may perhaps be noted at this stage that, even in the case of an application under section 4(2)(b) (ii), section 106 might raise an exception to the general rule as to onus. If for example the creditor were dead, it would in most cases be impossible for his personal representative affirmatively to prove that there had been no demand, and the onus would pass to the debtor. For these reasons, without in any way criticising the result which the learned Judge reached in *Bank of China v. Lam Tai Cheng*[1], I am of opinion that his view of the law as to onus of proof in that case was wrong, and I am satisfied that in this case the matter was rightly tried on the footing that duress, if it existed, must be proved by the debtor.

The question whether such duress did exist in this case is one of fact and this Court would be reluctant to disturb any finding of the learned trial Judge so far as it was based on the oral evidence; but his finding appears to have been based mainly on inference from the agreed correspondence and other facts not in dispute. It is to be observed that the learned Judge did not in terms reject the oral evidence of the appellant or criticise it on the footing of credibility. He apparently considered that it did not go far enough, or perhaps that it could not stand with the correspondence. He held in substance that the demands made by the Custodian for payment of the debt were only such demands as any creditor might make upon his debtor and did not involve any threat sufficient to constitute duress under section 4(5). I regret that I find myself obliged to differ from him in this.

I do not think it is possible, having regard to facts concerning Japanese officials of which the Court will take judicial notice, to treat the Custodian as an ordinary creditor or a demand made by him as equivalent to a demand by an ordinary creditor. The view taken by the legislature of the sinister activities of Japanese officials is reflected in the fact that a threat by an ordinary creditor to report his debtor to a Japanese official may of itself be sufficient to constitute duress. I desire to avoid any suggestion that a demand by a Japanese official would automatically create a situation amounting to duress. The law does not so provide in terms, and the wording of paragraph (c) of section 4(2) is opposed to any such suggestion. I prefer to put it that if the debtor received a demand from the Japanese Custodian the elements of a situation which might result in duress were already present. I entirely agree with the remarks made by Spenser Wilkinson, J. in *Bank of China v. Lam Tai Cheng*[1] as regards the effect of a demand for payment made by a Japanese official. Under section 4(5) of the Ordinance duress or coercion includes a threat of force, injury or detriment offered to the debtor which was of such a nature as to render his payment an involuntary act. I feel some doubt as to the true meaning of the word "involuntary" in this context. It is easy to say that any acceptance by a creditor who does not wish to be paid of monies forced on him by his debtor is involuntary, but can it equally be said that any payment by a debtor is "involuntary" if he is merely reluctant to pay at the time in question? I was at first inclined to think that "involuntary" must have some stricter meaning than that, and that perhaps it might have the narrow sense that the will of the debtor must be paralysed by the duress to the extent required for a plea of *non est factum* under English Common Law. That, however, in effect would merely be to refuse any special efficiency to the statutory definition. I think the true position is that any payment may be held to be "involuntary" if it is made with reluctance, or in other words, if the debtor would have preferred not to make it; but it is none the less necessary in addition that there should have been a threat of sufficient seriousness to have directed the debtor to a line of conduct which he would not otherwise have adopted. If that threat was in fact the governing consideration in his mind, and if it was reasonable that it should so operate upon the mind of a reasonable man, then there is duress within the meaning of the section.

Every case of duress must be decided on its own facts, and I turn now to the facts of this case. The appellant, before he received any demand from the Custodian, had been in the hands of the Kampeitai in connection with his refusal to join and support the

Indian Independence League. His evidence, which was not shaken in cross-examination, was that he had then been accused by Kampeitai officials of "non-co-operation." This is a word the meaning of which is only too well understood by those who had dealings with the Japanese occupation authorities. It would cover anything from armed resistance downwards. If it was used seriously by the Kampeitai, they were thinking in terms of capital punishment. There is no doubt that, if they had been satisfied that the appellant had been guilty of non-co-operation to any substantial extent, he would not have been alive to bring this appeal. This has a very real importance in connection with what occurred after the Custodian made his first demand for payment.

The evidence of the appellant, which again is uncontradicted and unshaken, is that the Custodian's officer in an interview with him said that, if he did not immediately take steps to discharge the debt, he would be considered guilty of non-co-operation. The effect of this on the appellant's mind might have been comparatively small if he had not previously been in the hands of the political police for a similar alleged offence; but in view of his previous record with them such a suggestion must have caused him, and would have caused any reasonable person, extreme alarm. In the circumstances then obtaining it would have been a very brave, and indeed a very rash, man who would have resisted such a demand, not on a point of military duty or honour, but merely to safeguard his pocket. Moreover, it is not necessary for this purpose to rely only on the oral evidence of the appellant, since by a letter dated 19th November, 1943, the point was raised again. In one of his frequent demands for payment the Custodian's Liquidation Officer wrote "You are now requested to make every effort to settle your outstanding balance within this year, in co-operation with, and loyalty to the Nippon Military Administration." This letter is confirmatory of the oral evidence. It indicates the status of the Custodian as a component part of the Japanese war machine, and it indicates the kind of measure that the Custodian would have been prepared to take in cases of defiance to his instructions. I think that this is proof of the clearest kind that duress existed. I am satisfied that the appellant sold his other lands with the utmost reluctance and at a gross undervalue. I am satisfied that he would not have done so, had it not been that he was in genuine fear of consequences which involved his life or freedom, and I am satisfied that any reasonable man in the same circumstances might well have done precisely the same as he did, and for the same reasons.

As regards the matters which led the learned Judge to think that no more pressure was exerted by the Custodian than any other creditor might properly exert on his debtor, I think it is clear that the expressions used by the debtor of willingness to pay and willingness to sell his assets were merely the most ordinary example of what I may call "stalling". He did everything possible to put off the evil day. It is quite improper to suppose that because he said on paper that he was willing to pay, that must be taken as literally true. As regards the letter in which he thanked the Custodian for his courtesy, I think this was no more than making the best of a bad job and smoothing over the end of a situation, the dangers of which might still not have been wholly dissipated. At the time of payment the appellant was still apparently opposed to the Indian Independence League and it was by no means impossible that he might come again into conflict with the authorities in consequence of that. In case he did so, he would at least have wished that his record as regards these transactions should appear to the Japanese as satisfactory as possible. I see nothing in any way inconsistent with his general case in these expressions of thanks to the Custodian.

I have had the advantage of reading the judgment of the learned President and I agree with it. In the result I am of opinion that the appellant must succeed and that this appeal should be allowed. The application should have been dismissed and the respondents must pay the costs of this appeal and in the Court below. The deposit should be paid out to the appellant's Solicitor.

Appeal allowed.

PUBLIC PROSECUTOR v. JAAFAR SHAH & ANOR.

[App. Crim. Juris. (Briggs, J.) December 23, 1951]

[Alor Star — Criminal Appeal No. 53 of 1951]

Food Control Proclamation cl. 4 — Ration Documents Regulations, 1948, regs. 3 and 4 — Control sugar.*

The Food Controller allows a retailer of sugar to buy one extra katty of sugar for each picul of his theoretical controlled turnover so as to provide against losses in transit and packing.

Held, that the accumulated surplus is not controlled sugar and the retailer may dispose of it as an uncontrolled article.

* G. N. 66 of 19/2/48.